

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2012AP452

Cir. Ct. No. 2010CV142

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PARK BANK,

PLAINTIFF-RESPONDENT,

V.

DAVID W. JACKSON,

DEFENDANT,

WACHOVIA MORTGAGE CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
ELLIOTT M. LEVINE, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Wachovia Mortgage Corporation appeals a judgment holding that its mortgage is inferior to one held by respondent Park

Bank. The dispute is essentially one between two lenders over whose mortgage has priority. We conclude that Park Bank did not establish on summary judgment that an agreement to subordinate its mortgage to Wachovia's mortgage is invalid. Therefore, we reverse and remand to the circuit court.

¶2 This case began as a foreclosure complaint by Park Bank against defendant David Jackson. Park Bank also named Wachovia Mortgage Corporation as a defendant, as a successor in interest to World Savings Bank. Park Bank alleged that Wachovia may claim an interest in the property under a lien, but further alleged that any interest or lien by Wachovia is subsequent, subordinate, and junior to Park Bank's interest.

¶3 In Wachovia's amended answer, it denied that its interest is subordinate to Park Bank's interest; pled equitable subordination as an affirmative defense; and pled, as a counterclaim, for a declaration that Wachovia is the equitable assignee or subrogee of First National Bank of Bangor, which earlier made a loan to Jackson that was secured by a first mortgage, but was paid off by Wachovia's refinancing provided to Jackson. The circuit court granted Park Bank's motion for summary judgment, and Wachovia appeals.

¶4 We first address Wachovia's argument that the circuit court erred by denying Wachovia's motion for default judgment after Park Bank did not timely answer Wachovia's counterclaim. We decide this first because if Wachovia prevails on this point, there is no need to address the merits of the case. However, the issue need not detain us long, because a defendant does not have standing to seek default judgment on a counterclaim. *Keene v. Sippel*, 2007 WI App 261, ¶18, 306 Wis. 2d 643, 743 N.W.2d 838. Therefore, Wachovia's motion for a default judgment on its counterclaim was properly denied.

¶5 We turn next to the circuit court's summary judgment decision as to which mortgage has priority. Summary judgment methodology is well established, and need not be repeated here. *See, e.g., Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980), *abrogated on other grounds by Olstad v. Microsoft Corp.*, 2005 WI 121, ¶23, 284 Wis. 2d 224, 700 N.W.2d 139. On our de novo review, we apply the same standard the circuit court is to apply. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶6 Park Bank moved for summary judgment.¹ Wachovia opposed summary judgment on the ground that, when Wachovia refinanced Jackson's original first mortgage loan, Park Bank made a subordination agreement under which Park Bank agreed to remain in the second mortgage position it originally occupied. The circuit court ruled that the subordination agreement was not valid for several reasons, rejected Wachovia's equitable arguments, and concluded that Park Bank was entitled to summary judgment.

¶7 Applying summary judgment methodology, we first conclude that the complaint states a claim and Wachovia's answer sufficiently joins issue. Therefore, we turn next to the arguments and proofs of the movant, Park Bank.² Park Bank offers several reasons why the subordination agreement is invalid.

¹ The record does not contain an actual motion for summary judgment, only a memorandum in support of summary judgment.

² Some of the material Park Bank submitted was not in the form of affidavit or other acceptable method under WIS. STAT. § 802.08 (2011-12), but comprised documents attached to its memorandum in support of summary judgment. Wachovia did not object to the material being in this form in the circuit court, and therefore we accept it on appeal.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶8 Some of Park Bank's arguments address whether Wachovia relied on the agreement. Park Bank does not explain how reliance is relevant to the legal validity of the agreement. As far as we can tell from the parties' legal arguments, reliance is relevant only to Wachovia's equitable arguments. The validity of the subordination agreement itself is a legal issue, not an equitable one, and therefore reliance does not appear to play a role in determining the validity of the agreement. Thus, the issue on appeal is whether Park Bank established that there are no disputes of material fact as to the validity of the subordination agreement.

¶9 Park Bank argues that the subordination agreement is invalid because it was not approved by Park Bank. As part of its summary judgment material, Park Bank submitted a copy of the subordination agreement document. Park Bank argues that the document has several flaws, some of which we will discuss further below. At this point, however, we focus on the issue of approval by Park Bank. The subordination agreement appears to be signed by Colin Fleming, with the title of Vice President of Park Bank.

¶10 Looking only at the face of the document, there are two reasons it is reasonable to infer that the subordination agreement was approved by Park Bank. The first is that the document is signed by Park Bank Vice President Fleming. The second is that it can reasonably be inferred that the document was transmitted to World Savings. The subordination agreement contains a fax machine stamp that appears to show it was sent by Park Bank on the date it was signed by Fleming. Elsewhere on the document is another fax machine transmission stamp from World Savings, three days later. It is reasonable to infer from these stamps that Park Bank faxed the document to World Savings on the date it was signed. It is

also reasonable to infer that Park Bank would not transmit the signed document to World Savings unless Park Bank considered it approved.³

¶11 Despite these reasonable inferences, Park Bank argues that it did not approve the subordination agreement because: (1) Fleming did not have the authority to sign on behalf of the bank; and (2) the agreement also contains a signature line for loan officer Paul Franke, but Franke did not sign.

¶12 In support of these arguments, Park Bank relies on the affidavit of Douglas Farmer. In his affidavit Farmer states that he is an executive vice president of Park Bank with personal knowledge of the Jackson loan. As material to the issue before us, Farmer avers that, to his “personal knowledge and based upon the records of the Bank, no loan subordination request was granted.” Farmer further avers: “It is the opinion of your affiant that any subordination request would have been denied by the SBA and Park Bank.”

¶13 We conclude that Park Bank’s argument and proofs are inadequate to make a *prima facie* case for non-approval. Park Bank has not presented any *legal* argument establishing that a bank vice president can never have the authority to approve a subordination agreement, or that the presence of a second, unsigned signature line necessarily shows lack of proper approval. Therefore, if Park Bank is to prevail on these points, it must do so based on facts specific to this case.

¶14 However, Park Bank has not presented evidence supporting its non-approval arguments. The Farmer affidavit is vague and general. It contains nothing more than conclusory assertions that a subordination agreement was not

³ Park Bank does not argue that the agreement document was not delivered.

granted, and would not have been granted. The affidavit contains no historical facts to support those conclusions. Specifically, the affidavit does not state or otherwise demonstrate that Fleming lacked the authority to sign the subordination agreement, or that bank policy required signatures of two officials for approval. The Farmer affidavit does not establish that non-approval by the bank is the only reasonable inference. Accordingly, in light of the contrary reasonable inferences that can be drawn from the face of the document itself, Park Bank has failed to present prima facie evidence that the bank did not approve the agreement. Therefore, Park Bank is not entitled to summary judgment on this basis.

¶15 Park Bank also argues that the Small Business Administration (SBA) did not approve, and would not have approved, the subordination agreement. Again, Park Bank does not make any legal argument showing that SBA approval was required. As to the facts, the Farmer affidavit might be read as implying that SBA approval was required. However, the affidavit does not specifically aver that the SBA either was required to or did not approve in this case; it avers only Farmer's "opinion" that the subordination request "would have been denied by the SBA." Farmer's speculation about what the SBA might or might not have done is not supported by historical facts or reference to specific policies or procedures in effect at that time. It does not establish that the only reasonable inference about the Jackson loan is that the SBA denied the subordination request, or that any action by SBA matters.

¶16 Park Bank also argues that the subordination agreement document is not notarized or authenticated, and therefore cannot be recorded under WIS. STAT. § 706.05(2), and thus would fail to make unrelated parties aware of the subordination. However, Park Bank does not explain how this claimed defect in

the document would make the agreement unenforceable as between Park Bank and Wachovia.

¶17 Finally, Park Bank also relies on flaws as to the names of the parties in the subordination agreement. The subordination agreement is a pre-printed, fill-in-the-blanks document. Park Bank asserts that on this agreement document the blanks are not filled in with the correct names to describe a transaction in which the Park Bank mortgage is made inferior to one based on a loan from World Savings to Jackson. In contrast, Wachovia argues that the document unambiguously does achieve that result or, in the alternative, that the document is ambiguous and therefore can be interpreted in light of extrinsic evidence, such as other documents related to the transaction.

¶18 We begin by rejecting Wachovia's argument that the document unambiguously describes a transaction that would make Wachovia's mortgage superior. Wachovia itself concedes that the wrong names are filled in some of the blanks. Without the correct names in the correct places, the document is not, on its face, an agreement that achieves the result Wachovia seeks.

¶19 We next consider whether the document is ambiguous. Park Bank does not dispute Wachovia's legal arguments about ambiguity and the use of extrinsic evidence, and therefore we apply those concepts here. We emphasize that in deciding whether the document is ambiguous, we do not resort to extrinsic evidence. In other words, we do not ask whether ambiguity exists when the document is read in conjunction with other evidence related to the transaction in this case. We look only at the face of the document itself. If the document is ambiguous, Wachovia may use extrinsic evidence to show the parties' intent. Therefore, on summary judgment, if Park Bank is to prevent Wachovia from

relying on extrinsic evidence, Park Bank must first establish that the document is not ambiguous.

¶20 To discuss ambiguity of the subordination agreement further, we review the document as it exists. To effectuate the transaction that Wachovia asserts is the correct one, the document should say that Park Bank is subordinating to World Savings a mortgage that Park Bank holds on Jackson’s property, and that after this subordination, the superior mortgage interest on the Jackson property will be based on a loan from World Savings to Jackson. However, what the document appears to say is that Park Bank is subordinating to *Park Bank* a mortgage that Park Bank holds on Jackson’s property, and that after this subordination, the superior mortgage interest on Jackson’s property will be based on a loan *from Park Bank to “World Mortgage [sic].”* In other words, read literally, this document says that Jackson’s existing debt to Park Bank, secured by a mortgage, will be in second place to a debt that “World Mortgage” will owe to Park Bank, which will also be secured by a mortgage on Jackson’s property.⁴

¶21 Wachovia argues that the document is ambiguous because, read literally, it provides that Park Bank is taking a subordinate position *to itself*, and this “cannot possibly” occur. We do not understand Wachovia to be arguing that the subordination agreement, as written, is susceptible to two different reasonable

⁴ Our reading of the document differs somewhat from Wachovia’s argument on appeal. Because the document in the record is difficult to read, Wachovia provides its own re-written version of what it believes the document says. As to paragraph two of the document, Wachovia asserts that the filled-in material reads: “David W. Jackson to World Mortgage.” However, looking at the original document in the record, it appears that the “David W. Jackson” part was struck with a series of X’s, leaving only “World Mortgage” in that blank area. Therefore, together with the pre-printed part of the form that follows this blank, we read the provision to say that the superior note will be one based on a loan to “World Mortgage” from “Lender,” which is previously shown on the form as being Park Bank.

interpretations, which is a common measure of ambiguity. Rather, Wachovia appears to be arguing that the document, as written, is not susceptible to *any* reasonable interpretation. In other words, Wachovia argues that the document is absurd because it describes a transaction that “cannot possibly” occur.

¶22 In response, Park Bank asserts that “it is very possible a lender would subordinate to itself. Lenders make multiple mortgages on properties all the time.” Park Bank then lists various types of transactions in which it asserts a bank may have to subordinate to itself, such as “refinance of one loan, sale of loan to participant, issuance of a home equity loan, secured credit cards, [and] use of loan programs such as Fannie Mae, Freddie Mac, VA, WHEDA, FmHA or FHA, just to name a few.” Park Bank provides no further details or descriptions about any of these types of transactions.

¶23 Given that this is summary judgment, and that Park Bank is the moving party with the burden to establish a *prima facie* case, we conclude that Park Bank has not provided a sufficient basis for us to conclude that the subordination agreement, read literally as written, describes a coherent and plausible transaction, rather than an absurd impossibility or improbability. Park Bank’s argument relies on concepts that may be familiar to the banking industry and may well be accurate descriptions of banking law or the policies of various agencies. To determine whether the agreement in this case describes a non-absurd transaction requires a certain level of familiarity with banking law and practice. However, judges are not bankers, and are not required to conduct their own research into banking law or practice. As a result, to establish that this document is not facially absurd, a party must provide a sufficient degree of additional background information to a court to put the document in broader context.

¶24 Perhaps Park Bank could have done this by submitting an affidavit from an expert who describes practices in the banking industry and explains why the subordination agreement, as written, is not absurd. Or, Park Bank might have been able to establish this point in its brief through citation to law, treatises, or other sources. We need not decide at this point whether either (or both) of these methods would be a proper method, because Park Bank has not done either. Ultimately, we are left without an adequate basis to conclude on summary judgment that the document, read literally, describes a transaction that is possible. Because Park Bank fails to establish that the document itself describes a transaction that unambiguously makes sense, for summary judgment purposes, Park Bank has failed to establish that extrinsic evidence cannot be used to interpret the document. Therefore, we next consider whether summary judgment in Park Bank's favor is proper when the extrinsic evidence is also considered.

¶25 We start with the material submitted by movant Park Bank. The following material is significant. Park Bank submitted what it describes as a copy of the underwriting worksheet for the World Savings loan to Jackson. On that worksheet the underwriter made several statements indicating that Park Bank had agreed to subordinate its mortgage. For example, under the heading "TRANSACTION," the worksheet states: "75% OQ REFI WITH SUBORDINATION OF OUTSIDE 2ND MORTGAGE WITH PARK BANK." Later, it states: "S BRIDGE APPROVED SUBORDINATING UNSEASONED 2ND MORTGAGE SUBORDINATION AGREEMENT IN FILE."

¶26 Park Bank also submitted a copy of the mortgage document that World Savings issued for Jackson's property. The document states that it is a first mortgage. In addition, the property description on that mortgage is the same as the property description on Park Bank's own mortgage with Jackson, and is also the

same as the property description on the subordination agreement we described above.

¶27 From this evidence, it is reasonable to infer that Park Bank agreed to subordinate its mortgage to the World Savings mortgage, and that Park Bank executed such a document and provided it to World Savings. That is a reasonable explanation for why the underwriter believed Park Bank was subordinating its mortgage, for why she stated that a subordination agreement with Park Bank was on file, and for why World Savings prepared a first mortgage, rather than a second mortgage, for its loan to Jackson.

¶28 Based on those inferences, it is also reasonable to infer that the subordination agreement document we discussed above is the document Park Bank provided to World Savings as part of this transaction. That is a reasonable inference because the subordination agreement describes a transaction among Jackson, “World Mortgage,” and Park Bank, and relates to the same Jackson property covered by the existing Park Bank mortgage and the new World Savings mortgage. Furthermore, the subordination agreement was dated and transmitted at the time the loan between World Savings and Jackson was being prepared.

¶29 Thus, based on the extrinsic evidence, it is reasonable to infer that the subordination agreement prepared by Park Bank was intended to subordinate Park Bank’s Jackson loan to a new World Savings mortgage, but Park Bank wrote the wrong names in the blanks on the form. Furthermore, Park Bank has offered no significant evidence to rebut this inference from the extrinsic evidence. Although Park Bank argues that it rejected or denied World Savings’ request for a subordination agreement, it does not offer any explanation for why its staff nonetheless prepared, signed, and transmitted a subordination agreement. Nor has

Park Bank offered any evidence that there is some *other* transaction for which this subordination agreement was prepared.

¶30 We next turn to Wachovia's claim for equitable subrogation. Park Bank first argues that equitable subrogation is not legally available on these facts. Park Bank asserts that none of the cases on which Wachovia relies show that equitable subrogation may be applied when there is a prior recorded mortgage. However, Park Bank does not cite any case law holding that equitable subrogation is *not* available in this situation, and does not otherwise develop an argument that it would be improper or unjust to allow equitable subrogation when there is a prior recorded mortgage. Accordingly, Park Bank has not persuaded us that equitable subrogation is unavailable here.

¶31 Second, Park Bank argues that it is entitled to summary judgment on the element of reliance. Park Bank argues that Wachovia did not present evidence that Wachovia relied on the claimed subordination agreement when Wachovia made its loan to Jackson. While Wachovia submitted no affidavit evidence as to its reliance, reliance by Wachovia can reasonably be inferred from the material Park Bank submitted on summary judgment. In particular, it is reasonable to infer from the loan worksheet described above that Wachovia regarded subordination by Park Bank as an integral part of the transaction. Therefore, Park Bank is not entitled to summary judgment on this ground.

¶32 For these reasons, we conclude that Park Bank has failed to establish that summary judgment can properly be granted in its favor. Park Bank's submissions failed to establish that material facts are not in dispute about the validity of the subordination agreement. Because conflicting reasonable inferences are present in movant Park Bank's own summary judgment material, it

is not necessary to proceed any further and consider non-movant Wachovia's material.

¶33 In conclusion, Park Bank has not shown that it is undisputed that the subordination agreement is invalid or otherwise unenforceable by Wachovia, as successor to World Savings, and therefore we reverse the judgment.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

